

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re MIA C., a Person Coming
Under the Juvenile Court Law.

B292239, B294305
(Los Angeles County
Super. Ct. No. CK74058C)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN
AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

ANTONIA C.,

Defendant and Appellant.

APPEAL from orders of the Superior Court of Los
Angeles County, Steff R. Padilla, Juvenile Court Referee.
Affirmed.

Judy Weissberg-Ortiz, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, Kristine P. Miles, Assistant County Counsel, Brian Mahler, Deputy County Counsel, for Plaintiff and Respondent.

Antonia C. (mother) appeals from the findings and order terminating parental rights under Welfare and Institutions Code section 366.26 as to her daughter, Mia C.¹ She also appeals the subsequent order denying her petition to change court orders under section 388. Mother contends the court committed prejudicial error because it terminated her parental rights under section 366.26 before conducting a hearing on her section 388² petition, and instead denied the petition 51 days later, in violation of her due process rights. Finding harmless error, we affirm the order terminating parental rights.

¹ All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

² Section 388 permits a parent to petition the court for a hearing to change an earlier order in the dependency proceeding.

FACTUAL AND PROCEDURAL BACKGROUND

Prior dependency and adjudication of current case (2009 – 2015)

Shortly after Mia was born in 2009, she was detained and declared a dependent child based on the dependent status of her older half-siblings. Mia was returned to mother's custody in March 2011; the court terminated jurisdiction of the case in May 2013.

The Los Angeles County Department of Children and Family Services (Department) opened a new investigation in October 2015 based on concerns about Mia's older half-sister harming Mia. Mother initially resisted speaking to the social worker, but then insisted that Mia be detained and placed in foster care because she believed Mia's older half-sister was harming Mia. Mother's mental health appeared unstable, and the Department detained Mia, placing her in a home with a foster family that continued to care for Mia throughout the dependency proceedings. Mother expressed unwarranted suspicions about various people, including the Department investigator, her neighbors, and people mother noticed during her visits with Mia. Mother visited Mia three times between October and December 2015, but stated she did not feel comfortable visiting in a public place because other people were asking questions and staring.

In December 2015, the dependency court declared Mia a dependent child under section 300, subdivision (b), based

on mother's mental and emotional problems.³ Mother agreed to a case plan requiring her to undergo a psychiatric evaluation under Evidence Code section 730, take all prescribed psychotropic medications, and participate in mental health counseling and parenting classes. The court ordered monitored visitation, twice a week for three hours per visit.

Reunification period (January 2016 – January 2017)

By April 2016, mother had only visited Mia six times over a seven-month period, and had cancelled some visits. Mother would closely check Mia's body during visits; she accused foster mother of not showering Mia based on dry skin behind Mia's ear. Mother was unwilling to have foster mother monitor visits. Mother also asked for the location of the visits to be changed and criticized the social worker. On the few occasions the social worker was able to meet with mother, mother seemed preoccupied with repeating complaints about her past experiences with the Department.

³ Because father is not a party to this appeal, our discussion focuses solely on the court orders concerning mother. At the time of the jurisdictional hearing, father's identity was unknown, and the court did not order reunification services for father. The record on appeal is unclear about whether Mia's father was identified or received notice of the proceedings, but his parental rights were terminated at the same hearing under section 366.26 where mother's parental rights were terminated.

Mother refused to provide information about her participation in court-ordered services, and also told the social worker she did not have time to participate. She reported taking psychotropic medication, but did not provide the name of the medication or copies of any prescriptions. At the six-month review hearing in June 2016, the court found mother in partial compliance with the case plan.

Between June and December 2016, mother changed her phone number several times and continued making negative comments about foster mother and the prior social worker. She believed her current and prior social workers were meddling in her case and making fun of her. Mother continued to advise others she only had time to visit once a week for two hours. She had a written visitation schedule and was required to confirm visits one day in advance. The report only contained information about one visit in November 2016, at which mother insisted Mia's head was swollen. Mother believed braiding Mia's hair would hurt her, and believed foster mother had braided Mia's hair to provoke mother, despite Mia and the social worker reassuring mother that the braid was fine. Even though mother had not seen the foster mother for four months, mother left the social worker three messages the weekend after the visit, again claiming foster mother was trying to provoke mother by braiding Mia's hair. Mother claimed she was seeing a psychiatrist and was taking medication, but did not provide any documentation.

Mia was doing very well at the foster parents' home, and had bonded significantly to them, calling them mom and dad. She expressed her desire to remain with the foster parents, who were willing to provide legal guardianship so long as they did not have to monitor mother's visits. In December 2016, mother brought the Department a report from the parenting education provider. According to the provider's report, mother's participation in classes was "poor," with mother attending only 11 of 26 weekly sessions, and only 1 of her 15 absences being an excused absence. Mother complained the classes were not done the right way, and also blamed the social worker for changes in staff behavior at the community center where the classes took place. At the 12-month review hearing on January 25, 2017, the court terminated mother's reunification services, consistent with the Department's recommendation.

Permanency planning (January 2017 – August 2018)

Over the next 20 months, mother's visits remained sporadic. After Mia's foster parents agreed to adoption, rather than legal guardianship, mother filed a petition under section 388, which the Department opposed. The court continued the section 388 and 366.26 hearings several times, and at one hearing, mother's counsel mistakenly informed the court that mother's section 388 petition had already been denied, although no hearing had in fact taken place. Accepting mother's counsel's representation and acting on

the mistaken understanding that the section 388 hearing had already taken place, the court continued the section 366.26 hearing without ruling on mother's section 388 petition. At the continued section 366.26 hearing, the court ordered parental rights terminated.

A. Department resolves foster family's reservations about adoption; no visitation by mother

The Department's May 2017 permanency planning report stated that mother had not visited Mia in the past five months, cancelling at least two visits. Foster parents refused to monitor mother's visits, and noted that Mia would become nervous and anxious after mother's visits.

Regarding Mia's permanency prospects, the Department noted she had a positive connection with the foster family she had been living with for 19 months. However, the foster parents were not committed to adopting Mia, instead seeking legal guardianship.⁴ The Department intended to address the family's reservations about adoption, and if unsuccessful would look for an alternate placement. By July 2017, the foster family wanted to adopt Mia, and she wanted to be adopted by them.

⁴ Although the record is not entirely clear, it appears that the foster parents' prior experience with the adoption process led them to favor legal guardianship. Among their stated concerns was a desire to minimize contact with mother.

B. Mother's section 388 petition

In September 2017, mother filed a petition under section 388 seeking to have Mia returned to her custody or have reunification services reinstated. Mother argued that the order terminating reunification services should be changed because she provided paperwork that she (a) was taking her prescribed medicine, (b) had taken a parenting class, and (c) had a psychological evaluation with the designated doctor. The documentation attached to mother's section 388 petition consisted of (a) a copy of a December 2016 prescription for a 30-day supply of a medication, (b) a March 2017 certificate from the parenting program stating mother had attended 12 classes and a copy of two May 2016 receipts from the parenting program showing mother had made two payments of \$15 each, and (c) a letter from the psychologist's office confirming that mother attended a single appointment on May 16, 2017.

The court continued the section 366.26 hearing, scheduled a hearing on mother's section 388 petition, and ordered the Department to file a response to the petition. The court also ordered the Department to investigate concerns expressed by mother about possible injury to Mia, as discussed below.

C. Department's progress report and opposition to mother's section 388 petition

The Department's January 2018 permanency planning report reviewed the history of mother's concern about possible injury to the child. On August 31, 2017, the social worker advised mother that Mia had been grazed by a small firework and treated immediately afterwards. Nevertheless, mother had called the Department hotline on September 1, 2017 to complain that she had not received a response to an earlier complaint that foster mother was abusing Mia. According to mother, she noticed a white mark on Mia's neck and understood that it was from an injury on the Fourth of July. Mother then transitioned to complaining about foster mother and the social worker. Social workers for the Department and the foster family agency reported they saw no marks or bruises on Mia in September 2017.

Between March and December of 2017, mother only visited Mia once, in September. During that visit, mother raised concerns about possible bruising or swelling of Mia's eye, but two social workers examined Mia's eye and found no signs of bruising or swelling. After mother had voiced her concern about Mia's eye, she continued to question why Mia was not being properly cared for. The social worker had to remind mother not to discuss case issues in front of Mia.

Mia had been living with her foster family for two years and expressed a desire to remain living with her foster parents. The Department recommended adoption as the best plan for Mia.

Objecting to the relief sought in mother's section 388 petition, the Department emphasized that mother had poor attendance for her parenting class, and the results of her psychological evaluation did not support providing mother additional reunification services or returning Mia to her custody. Mother rarely visited Mia, and when she did, she appeared to be more focused on criticizing Mia's foster parents or Department staff than on connecting with Mia. The psychological assessment reported that mother was "defensive [and] did not disclose information about herself."

In January 2018, the court continued both the section 388 hearing and the section 366.26 hearing to May 2018, finding the prior notice was not proper.

D. Mother's counsel mistakenly informs court that mother's section 388 petition had already been denied

In May 2018, when the court called the case and asked how counsel wished to proceed on the section 388 hearing, mother's counsel advised the court that it had already denied mother's section 388 petition. The colloquy in court proceeded as follows:

"The Court: Let's start with the 388. How does counsel wish to proceed?"

"[Counsel]: Your honor, my appearance sheet from January 24th, has that the 388 was already adjudicated and denied, but we can certainly do it again if you'd like."

“The Court: It’s already been taken care of, been already ruled on; right?

“[Counsel]: Yes, your honor.

“The Court: And it was denied; right?

“[Counsel]: That’s the record I have.

“The Court: All right. [¶] Matter is on calendar today for the .26.”

Acting under the mistaken understanding that the section 388 petition had already been denied, the court continued just the section 366.26 hearing.

E. Section 366.26 hearing terminating parental rights

On August 22, 2018, the court conducted the section 366.26 hearing. When mother’s counsel asked to set the matter for a contest, the Department pointed out that mother had only visited Mia twice that year, once in January and once in May. The court asked for an offer of proof, and counsel stated, “My offer of proof would be the visitation that mother has had with the child.” The court found the offer of proof was not legally sufficient to set the matter for a contest, noting that to establish a parental relationship, the law required consistent ongoing visitation, which mother could not show. The Department offered its reports into evidence, and the court terminated the parental rights of mother, two alleged fathers whose whereabouts were unknown, and anyone else claiming to be Mia’s parent.

Mother's appeal and subsequent proceedings

On August 23, 2018, mother appealed the termination of her parental rights under section 366.26. On October 11, 2018, she filed an amended notice of appeal, adding as a grounds for appeal the court's failure to hold a scheduled hearing on mother's section 388 petition.

On October 12, 2018, the court held a hearing at which it acknowledged there was no record of it denying mother's section 388 petition. With only counsel for the Department and minor's counsel present, the court stated it was "denying the 388 petition prior to the .26." In November 2018, mother filed a supplemental opening brief in this case, challenging the October 12, 2018 order. Mother also filed a separate notice of appeal, which this court consolidated with the current appeal.

DISCUSSION

Mother contends it was prejudicial error for the court to terminate her parental rights under section 366.26 without conducting a full and fair hearing on her section 388 petition. In her opening brief, mother argues the court conducted the section 366.26 hearing on the mistaken belief that it had already denied mother's section 388 petition, and that the failure to conduct a section 388 hearing violated her right to due process. In her supplemental opening brief, mother argues that the court's action in denying her section

388 petition at a subsequent hearing without notice or an opportunity to be heard was also a violation of her due process rights and prejudicial error. With respect to the termination of parental rights, the Department responds that mother invited the error by leading the court to believe it had already denied mother's petition, that she forfeited the issue by failing to object, and that any error was harmless. The Department also argues that the court lacked authority to deny mother's section 388 petition after it had terminated mother's parental rights. Because mother failed to object before the termination of parental rights and has not shown that there is any reasonable probability the court would have granted her section 388 petition, we find no prejudicial error and we affirm the order terminating parental rights.

“[A] reviewing court ordinarily will not consider a challenge to a ruling if an objection could have been but was not made in the trial court. [Citation.] The purpose of this rule is to encourage parties to bring errors to the attention of the trial court, so that they may be corrected. [Citation.]” (*In re S.B.* (2004) 32 Cal.4th 1287, 1293, fn. omitted.) Although appellate courts have discretion to excuse forfeiture, that discretion must be exercised with special care in dependency proceedings, where “considerations such as permanency and stability are of paramount importance. [Citation.]” (*Ibid.*)

Here, mother forfeited the due process issue arising from the termination of her parental rights without first conducting a hearing on her section 388 petition. Not only did mother neglect to make any objection to give the court an

opportunity to correct its oversight in proceeding to termination of parental rights before ruling on the still-pending section 388 petition, her own counsel was the cause of the oversight. On these facts, we conclude mother forfeited any challenge based on the court's failure to conduct the hearing on her section 388 petition before terminating parental rights.

To the extent mother's supplemental brief raises a separate due process challenge to the trial court's post-termination order belatedly denying her section 388 petition, mother has not shown prejudicial error. To successfully appeal the order, mother must show that there was a reasonable probability that court would have granted the petition. (*In re Celine R.* (2003) 31 Cal.4th 45, 59–60 [reviewing court must find that a more favorable result was reasonably probable but for the error]; *In re Alayah J.* (2017) 9 Cal.App.5th 469, 481 [same].)

“Section 388 accords a parent the right to petition the juvenile court for modification of any of its orders based upon changed circumstances or new evidence. [Citations.] To obtain the requested modification, the parent must demonstrate both a change of circumstance or new evidence, and that the proposed change is in the best interests of the child. [Citations.] [¶] Section 388 provides an “escape mechanism” for parents facing termination of their parental rights by allowing the juvenile court to consider a legitimate change in the parent's circumstances after reunification services have been terminated. [Citation.] This procedural

mechanism, viewed in the context of the dependency scheme as a whole, provides the parent due process while accommodating the child's right to stability and permanency. [Citation.] After reunification services have been terminated, it is presumed that continued out-of-home care is in the child's best interests. [Citation.] Section 388 allows a parent to rebut that presumption by demonstrating changed circumstances that would warrant modification of a prior court order. [Citation.]" (*In re Alayah J.*, *supra*, 9 Cal.App.5th at p. 478, fn. omitted.)

An order for a hearing on a section 388 petition may not be contingent on the outcome of a section 366.26 hearing. Once a parent has made a prima facie case for the right to relief under section 388, and the trial court does not summarily grant the petition, it "must either (1) hold an evidentiary hearing on the petition, or (2) hold a hearing for the parties to argue whether an evidentiary hearing on the petition should be granted. (Rule 5.570(f))." (*In re Alayah J.*, *supra*, 9 Cal.App.5th at p. 480.)

The facts and evidence demonstrate that there was no reasonable probability that the court would have reinstated reunification services or returned Mia to mother's care, regardless of whether the section 388 hearing had taken place before or after the termination of parental rights. Nothing in mother's petition or the record evidence showed either changed circumstances or that additional reunification efforts would be in Mia's best interests. Mother's visits with Mia were few and far between. In her

appellate briefing, mother claimed she had completed a parenting class, but a closer examination of the certificate attached to her section 388 petition shows that mother had only taken 12 classes of a 26-week parenting course. Although mother met with the psychologist appointed to do a 730 evaluation, his report stated she refused to disclose anything. To support her claims that she was in compliance with her prescribed medications, she attached to her September 2017 section 388 petition a prescription from December 2016 that only indicated a 30-day supply of medicine, with no refills. Mia had lived with foster parents since her initial placement in October 2015. She was emotionally bonded to the family, calling her foster parents mom and dad, and expressing a desire to be adopted and to take their family name. The foster parents initially sought legal guardianship for Mia, based on concerns about mother's threatening behavior. After talking with the Department, they agreed to adopt Mia, offering the stability and permanency prioritized for dependent children under the statutory scheme and case law. (§ 366.26; *In re Stephanie M.* (1994) 7 Cal.4th 295, 317.) Because mother has not shown a reasonable probability that the court would have granted mother's section 388 petition, any error in failing to conduct a full hearing was harmless.

DISPOSITION

The order terminating parental rights is affirmed.

MOOR, J.

We concur:

RUBIN, P.J.

BAKER, J.